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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KEVIN JONES, Defendant and Appellant.	B204560 (Los Angeles County Super. Ct. No. BA311641)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed.

Kenneth J. Hutz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Roberta L. Davis and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Kevin Jones appeals from the judgment entered after a jury convicted him of selling cocaine base (Health & Saf. Code, §11352, subd. (a)) for which he was sentenced to the upper term of five years in state prison.[1] Jones contends the evidence was insufficient to support his conviction and the trial court erred in failing to instruct sua sponte on aiding and abetting. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of October 29, 2006, undercover police officer Jose Zamudio whistled to Darryl Harris who was riding a bicycle through the skid row area of Los Angeles. When Harris rode up, Zamudio explained he had mistaken Harris for someone else and then asked Harris, "Do you know where I can get a twenty at?" (A "twenty" is street vernacular for $20 worth of illegal drugs.) Harris asked Zamudio to give him the money, but Zamudio refused, insisting on seeing the drugs first. Harris told Zamudio to accompany him.

They crossed the street and Harris again asked Zamudio for his money. This time, Zamudio handed Harris a pre-recorded $20 bill. Harris took the money and rode his bicycle some 20 feet to where Jones and Larry Durgin[2] were talking together, outside a tent. Harris conversed with them briefly, gave the $20 bill to Jones, and immediately held his palm out to Durgin, who placed something in it. Harris rode back to Zamudio and handed him two pieces of rock cocaine.

Using a prearranged signal, Zamudio alerted uniformed officers he had witnessed a drug transaction. The officers responded, and Jones, Harris and Durgin were arrested. Jones was found with the pre-recorded $20 bill inside a tobacco pouch he was carrying.

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[1] A second count of selling cocaine base was dismissed in furtherance of justice (Pen. Code, § 1385) on the prosecutor's motion; and a prior strike enhancement allegation (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) was dismissed for lack of evidence.

[2] "Larry Durgin" also appears in the record as "Larry Dirgan."

A subsequent search yielded $290 of additional cash: $240 in Jones' left sock, $20 in his right sock, and $30 in his pants' pocket. No drugs were found in Jones's possession.

As an expert in street drug sales, Officer Zamudio opined, without objection, that Jones, Harris and Durgin were acquainted and were working together to sell rock cocaine, because the transaction occurred so quickly. Zamudio explained it is not uncommon for drug transactions to involve several people: one person to "hook up" a buyer and seller, as Harris did, a second person to hold the money, as Jones did, and a third person to hold the drugs, as Durgin did. Zamudio also opined, based on his training and experience, that $290 is an unusually large sum of money to carry in the skid row area, unless it is related to drug sales, as Zamudio concluded the money was in this case.

Jones testified in his defense he was walking on the streets of skid row when an unknown man riding a bicycle stopped Jones in front of a tent. The man asked what Jones needed. Jones answered he did not need anything, and the man rode away some twenty feet, before police officers suddenly appeared and threw Jones and others in the vicinity against a wall. Jones, the man on the bicycle, and another unfamiliar man near the tent were all arrested.

Jones denied selling rock cocaine, receiving any money from Harris or carrying a tobacco pouch. Jones claimed officers lied about finding the pre-recorded $20 bill in his possession. Jones also testified to not knowing the man on the bicycle or the man near the tent.

Jones explained money in his possession was from an $839 SSI check. After depositing $500 into his account, he hid the remaining cash in his socks to avoid a robbery.

Following the presentation of evidence the prosecutor argued Jones, Harris and Durgin were all involved in selling rock cocaine to Officer Zamudio, albeit in different roles. Jones's role in their enterprise was to control the purchase money. The defense theory was Jones was mistakenly arrested because he happened to be standing where Harris and Durgin were trafficking in illegal drugs.

DISCUSSION

1. *Sufficiency of the Evidence*

a. Standard of Review

In reviewing a challenge to the sufficiency of the evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Staten* (2000) 24 Cal.4th 434, 460.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime or the special allegation present beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the jury's finding].'" (*Ibid*., quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

"Substantial evidence" in this context means "evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 [""[W]hen the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt""].) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

b. Substantial Evidence Supports Jones' Conviction

It is unlawful to sell or furnish a controlled substance in California without a prescription from a licensed doctor. (Health & Saf. § 11352, subd. (a).)[3] The illegal sale of a controlled substance like cocaine base is a general intent crime that is committed when there is a transfer of possession of the controlled substance to another person for cash. (*People v. Daniels* (1975) 14 Cal.3d 857, 859.)

At trial, Officer Zamudio testified as an expert witness that he watched Jones, Harris and Durgin, and opined they were working together to sell drugs, and Jones' role was to hold the purchase money. Jones never objected to Zamudio's opinion as improper expert testimony on the ground a defendant's subjective mental state at the time of the offense was to be decided by the jury. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*).[4] However, Jones now relies on *Killebrew* to argue, in the context of a substantial evidence claim, that Zamudio's opinion lacks any factual support and therefore cannot support the conviction as a matter of law.[5]

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[3] As the jury was instructed, to secure a conviction for a violation of Health and Safety Code section 11352, subdivision (a), the prosecution must prove beyond a reasonable doubt, "1. A person sold cocaine base, a controlled substance, and 2. That person knew of its presence and nature as a controlled substance." (CALJIC No. 12.02.) "The words 'knew' or 'knowingly' means with knowledge of the existence of the facts in question. Knowledge of the unlawfulness of any act or omission is not required. A requirement of knowledge does not mean that the act must be done with any specific intent." (CALJIC No. 1.21.)

[4] The objectionable testimony in *Killebrew* consisted of a gang expert's opinion that because gang members generally know when their comrades possess a gun, each gang member in three different cars actually knew of the guns in two of the cars and constructively possessed the guns for protection. (*Killebrew, supra*, 103 Cal.App.4th at p. 658.)

[5] Jones also relies on *People v. Hunt* (1971) 4 Cal.3d 231, which is not applicable here, where the California Supreme Court determined a police officer's expert opinion, that the methedrine—otherwise lawfully in the defendant's possession by virtue of a prescription—was being possessed for sale, was not substantial evidence of possession

Assuming without deciding that Officer Zamudio's opinion testimony as to Jones' involvement and specific role in the drug transaction exceeded the bounds of expert testimony permitted by *Killebrew*, Jones forfeited this assertion of error by failing to make it in the trial court. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 505.) Nevertheless, "error in admitting expert testimony where none is needed may be entirely harmless where the expert really adds nothing to what must be apparent to the jury's common sense." (*People v. Hernandez* (1977) 70 Cal.App.3d 271, 281.) Thus, even absent forfeiture, Jones's challenge to the sufficiency of evidence fails. Zamudio's conclusion was based solely on his observations of Harris speaking briefly with Jones and Durgin, before giving the purchase money to Jones and immediately receiving the rock cocaine from Durgin—evidence already before the jury for its consideration. (*Killebrew, supra,* 103 Cal.App.4th at pp. 658-659 [distinguishing scenario where observed facts, which jury can assess, underpin officer's opinion testimony].)

Additionally, rather than testifying he received the pre-recorded $20 from Harris for reasons unrelated to the drug transaction, as he now suggests on appeal, Jones testified at trial he never received any money from Harris, and police lied about finding the pre-recorded $20 bill in his possession. Simply put, unlike *Killebrew*, where the "erroneously admitted testimony provided the only evidence to support the conspiracy theory" (*id.* at p. 659), here the jury had two conflicting versions of what had occurred – either that Jones was working with Harris and Durgin to sell rock cocaine or that Jones was an innocent bystander who was mistakenly arrested while standing near two drug traffickers. Because the question of Jones's guilt turned on credibility, it is not reasonably probable he would have obtained a more favorable outcome had the trial court excluded Zamudio's opinion testimony. Sufficient evidence supports his conviction.

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for sale of a restricted dangerous drug because the officer lacked sufficient expertise concerning the lawful use of the drug. (*Hunt, supra,* 4 Cal.3d at pp. 237-238.)

2. *Aiding and Abetting Instructions*

Jones contends the trial court erred in failing to give instructions sua sponte on aiding and abetting, such as CALJIC Nos. 300 and 3.01,[6] to "inform the jury that a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561; see *People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

It is important to note aider and abettor liability is vicarious in the sense the aider and abettor is liable for another's actions as well as his or her own. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118. Thus, the giving of aiding and abetting instructions would have assisted the prosecution by broadening the possibility of a conviction, and the absence of such instructions under the circumstances was to Jones's advantage. The jury was able to convict only if it concluded he was a direct perpetrator in selling rock cocaine. Unlike the authorities cited by Jones (see, e.g., *People v. Reyes* (1992) 2 Cal.App.4th 1598, 1601; *People v. Campbell* (1994) 25 Cal.App.4th 402, 412), the prosecution did not seek Jones's conviction as an aider and abettor.

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[6] CALJIC No. 3.00 provides: "Persons who are involved in [committing] [or] [attempting to commit] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or [¶] 2. Those who aid and abet the [commission] [or] [attempted commission] of the crime." CALJIC No. 3.01 provides: "A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be present at the scene of the crime.] [¶] [Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.] [¶] [Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]"

Jones argues to the contrary, contending the prosecutor's reference during closing argument to Jones, Harris and Durgin "working in concert" could only pertain to aiding and abetting. While it is true the prosecutor argued "[a]ll three [men] were involved" in the drug transaction, the prosecutor then focused on Jones, and told the jury Jones directly participated in the sale by accepting the purchase money, in exchange for the rock cocaine supplied by Durgin, who was standing beside him.

We conclude the trial court did not have a sua sponte duty to instruct on aiding and abetting because a review of the prosecutor's complete argument shows she did not introduce this theory into the case, and Jones's direct participation in the drug transaction negated any need for such instructions.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.